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3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

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6 MONTE LEE BURCH,

Case No. 2:17-cv-00656-MMD-VCF

7 Petitioner,

ORDER

8 v.

9 RENEE BAKER, et al.,

10 Respondents.
11

12 **I. SUMMARY**

13 This is a habeas corpus action under 28 U.S.C. § 2254. Before the Court is
14 Respondents' motion to dismiss Monte Lee Burch's Amended Petition (the "Motion") (ECF
15 No. 34).¹ The Court finds that some grounds of the Amended Petition are untimely and
16 that Burch has not exhausted some grounds for relief. The Court thus grants the Motion
17 in part and denies it in part.

18 **II. BACKGROUND**

19 After a jury trial in state district court, Burch was convicted of six counts of sexual
20 assault with a minor, one count of lewdness with a minor, and one count of attempted
21 sexual assault with a minor. (ECF No. 35-39.) P.R. was the minor. P.R.'s mother was
22 Shawna, who was Burch's girlfriend at the time. Burch appealed, and the Nevada
23 Supreme Court affirmed. (ECF No. 35-40.)

24 Burch then filed a proper-person post-conviction habeas corpus petition in state
25 district court. (ECF No. 36-19.) The state district court appointed counsel, who filed a

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28 ¹The Court has reviewed Petitioner's opposition (ECF No. 43) and Respondents'
reply (ECF No. 50).

1 supplement to the petition. (ECF No. 36-35.) The state district court held an evidentiary
2 hearing. (ECF No. 37-2.) After the evidentiary hearing, counsel filed another supplement
3 to the petition. (ECF No. 37-4.) The state district court then denied the petition. (ECF No.
4 37-7.) Burch appealed. The Nevada Court of Appeals affirmed. (ECF No. 37-26.)

5 **III. DISCUSSION**

6 **A. TIMELINESS**

7 Burch had one year from the date his judgment of conviction became final to file a
8 federal petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2254, § 2244(d)(1)(A).
9 The judgment became final when the time to petition the Supreme Court of the United
10 States for a writ of certiorari expired. *Jimenez v. Quarterman*, 555 U.S. 113, 119-20 (2009).

11 The time that Burch spent on his state post-conviction habeas corpus petition does
12 not count toward the federal one-year period. 28 U.S.C. § 2244(d)(2). That tolling ended
13 after the Nevada Supreme Court issued its remittitur. *Jefferson v. Budge*, 419 F.3d 1013,
14 1015 n.2 (9th Cir. 2005).

15 Burch mailed his initial, proper person petition (ECF No. 7) to the Court on February
16 13, 2017. It is timely under 28 U.S.C. § 2244(d)(1). Burch filed his counseled Amended
17 Petition on July 3, 2018 (ECF No. 19), after the one-year period had expired. The grounds
18 in the Amended Petition will need to relate back to the grounds in the initial petition.

19 An amended habeas corpus petition “does not relate back (and thereby escape [§
20 2244(d)(1)’s] one-year time limit) when it asserts a new ground for relief supported by facts
21 that differ in both time and type from those the original pleading set forth.” *Mayle v. Felix*,
22 545 U.S. 644, 650 (2005). Relation back is allowed “[s]o long as the original and amended
23 petitions state claims that are tied to a common core of operative facts” *Id.* at 664.

24 Respondents argue that grounds three, four, five six(C), and part of eight do not
25 relate back and are untimely. The Court agrees with Respondents on some of the grounds.

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1 **1. Ground three is not timely**

2 In ground three, Burch claims that trial counsel failed to convey favorable plea
3 offers.² Respondents argue that no such facts appear in the initial petition. Burch does not
4 dispute this. Instead, Burch argues that the period of limitations started later—and might
5 not yet have started under 28 U.S.C. § 2244(d)(1)(D) because he does not know all the
6 facts about the plea offers. The statute of limitations begins to run under § 2244(d)(1)(D)
7 when a person knows the “vital facts” of a claim or could have discovered it through
8 reasonable due diligence. *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012) (citations
9 and footnotes omitted). Under § 2244(d)(1)(D), ground three could be timely if (1) the
10 details of the plea offers are vital facts and (2) through the exercise of due diligence Burch
11 could have learned those vital facts no earlier than a year before he filed the Amended
12 Petition.

13 Burch litigated this claim in his state post-conviction habeas corpus proceedings.
14 The issue came up during the state-court evidentiary hearing on June 5, 2015. (ECF No.
15 37-2 at 8-9, 10-11, 12) (rough draft transcript with four pages of transcript per sheet of
16 paper). Burch briefed the issue in a post-hearing supplement. (ECF No. 37-4.) Then the
17 parties argued the issue at another hearing. (ECF No. 37-6.) Even if the specific details
18 are not known, counsel and the prosecutor agreed that the typical offer before the
19 preliminary hearing was to plead guilty to two counts with sentences of 2 years to 20 years
20 each. The offer after the preliminary hearing but before trial had a life sentence. However,
21 the vital facts of ground three were not what the details of the plea offers were, but whether
22 counsel had told Burch about the offers. On those facts, the state district court denied the
23 claim, crediting trial counsel’s testimony that he communicated the offers to Burch and
24 recommended accepting them; the trial court discredited Burch’s testimony. (ECF No. 37-

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27 ²The title of ground three states in the alternative that trial counsel failed to advise
28 petitioner appropriately about the plea offers. (ECF No. 19 at 15.) However, the body of
ground three contains only allegations that trial counsel did not inform petitioner about the
plea offers. (*Id.*)

1 7 at 9-10.) The Nevada Court of Appeals affirmed for the same reasons. (ECF No. 37-26
2 at 3-4.)

3 Furthermore, whatever the vital facts of ground three are, for the purposes of
4 § 2244(d)(1)(D), Burch knew or could have discovered them through due diligence on
5 June 5, 2015, or shortly thereafter. Burch was present at the evidentiary hearing when the
6 issue of communicating the plea offers arose, and he testified that counsel did not inform
7 him about those offers. (ECF No. 37-2 at 12.) Even if § 2244(d)(1)(D) applied, the one-
8 year period for ground three would have started on or near that date, when Burch himself
9 knew of the issue. The still-pending state post-conviction proceedings would have tolled
10 the one-year period immediately under § 2244(d)(2). The one-year period effectively
11 would have started the day after the issuance of the remittitur on November 15, 2016.
12 Burch filed his Amended Petition on July 3, 2018. Ground three still would need to relate
13 back to the initial, proper-person petition, but the initial petition contains no facts related
14 to plea offers. Ground three is therefore untimely.

15 Burch argues that if he failed to develop the vital facts in state court, then that was
16 the fault of post-conviction counsel and therefore the Court should excuse the
17 untimeliness of ground three under *Martinez v. Ryan*, 566 U.S. 1 (2012). Under *Martinez*,
18 the ineffective assistance of post-conviction counsel, or the absence of post-conviction
19 counsel, can be cause to excuse the procedural default of a claim of ineffective assistance
20 of trial counsel. The Supreme Court has made clear that *Martinez* extends no further than
21 procedurally defaulted claims of ineffective assistance of trial counsel. *Davila v. Davis*, 137
22 S. Ct. 2058 (2017).

23 Rather than use a state-law procedural bar to deny the claim now in ground three,
24 the state courts ruled on the merits of that ground. Ground three is therefore not
25 procedurally defaulted due to application of state law; it is untimely under federal law. It is
26 untimely because it does not relate back to the initial petition. It does not relate back to the
27 initial petition because Burch himself, not his prior post-conviction counsel, did not include

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1 the claim in the initial, proper person petition, even though Burch knew about the claim
2 years before.

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4 **2. As an ancillary matter, the Court will not reconsider its denial of
Burch's motion for leave to conduct discovery**

5 Burch had filed a motion for leave to conduct discovery. (ECF No. 22.) He wanted
6 to obtain records from the prosecution's office, depose prosecutors, and conduct other
7 discovery to find the details of the plea offers. The Court denied the motion. The Court
8 reasoned that ground three appeared to be untimely and that it would not relate back to
9 any facts in the initial petition. (ECF No. 28.) Discovery thus would be premature, and
10 possibly futile, until Burch can demonstrate that ground three was timely. *Id.*

11 Burch has filed a motion to reconsider that order. (ECF No. 44.) He argues that
12 when the Court denied that motion due to the possible untimeliness of ground three, the
13 Court did not have the opportunity to consider whether discovery could result in the
14 delayed accrual of the one-year period of limitation under 28 U.S.C. § 2244(d)(1)(D).

15 The Court sees no need to reconsider its prior order. As noted above, even with
16 delayed accrual under § 2244(d)(1)(D), ground three still would be untimely. By the time
17 that Burch commenced this action, he knew all that he needed to know to put the claim of
18 ground three into his initial petition. The details of the plea offers would not change that.

19 **3. Ground four is not timely**

20 Ground four of the Amended Petition claims that trial counsel provided ineffective
21 assistance because trial counsel disclosed to the prosecution an unfavorable report on
22 DNA by a retained defense expert, Norah Rudin. Burch argues that the ground relates
23 back to grounds four and 14 of the initial petition. (ECF No. 43 at 10.) Initial ground four
24 was a claim that trial counsel provided ineffective assistance by not hiring any experts,
25 including a DNA expert. (ECF No. 7 at 15-17.³) Initial ground 14 is a claim that trial counsel
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³In initial ground four, Petitioner also claimed that trial counsel did not employ
psychologists and an investigator to examine the victim, but those facts have no
relationship to amended ground four. (ECF No. 7 at 15-17.)

1 provided ineffective assistance by not employing an expert to counter the prosecution's
2 expert witness on DNA. (ECF No. 7 at 33.) The facts in the initial petition are that counsel
3 did not hire any experts. The facts in amended ground four are that counsel did hire an
4 expert and then disclosed that expert's report to the prosecution. Not only does amended
5 ground four not share a common core of operative fact with the initial petition, the facts in
6 the Amended Petition about hiring an expert contradict the facts in the initial petition.
7 Ground four does not relate back, and it is untimely.

8 **4. Ground five is timely**

9 In ground five of the Amended Petition, Burch claims that the prosecution
10 committed misconduct by improperly admitting prior-bad-act evidence that it had
11 previously agreed to redact. In that ground, Burch describes in detail what had happened.
12 The police had interviewed P.R. who told the police that Burch had been violent with
13 Shawna, that Burch had been in jail multiple times, and that P.R. and other children had
14 called the police when Burch was violent with Shawna. The parties agreed to redact those
15 statements before playing the recording of the interview to the jury. However, the redaction
16 was incomplete, and the jury heard P.R. say that the children had called the police when
17 Burch hurt Shawna. The prosecutor said that the statement was mistakenly unredacted,
18 and the prosecutor admitted that she had not checked whether her staff had correctly
19 redacted the recording. (ECF No. 19 at 20-21.) In initial grounds two and three, Burch
20 alleged that the prosecution played recorded statements that were ordered to be redacted,
21 that the prosecution knew that the statements had not been redacted, and that the
22 prosecutor's response to that was "oops." (ECF No. 7 at 7, 12.) The Court is not persuaded
23 by Respondents' argument that in those initial grounds Burch did not allege when the error
24 occurred and what the inadmissible statements were. (ECF No. 50 at 7.) Only one
25 incorrect redaction occurred in the trial. The facts that Burch alleged in initial grounds two
26 and three are similar in time and type to the facts that Burch alleges in amended ground
27 five. See *Mayle*, 545 U.S. at 650. Ground five relates back, and it is timely.

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1 **5. Ground six(C) is untimely**

2 In ground six(C) of the Amended Petition, Burch claims that trial counsel did not try
3 to locate, let alone call as exculpatory witnesses, two people known as Cheyenne and
4 David. The Court is not persuaded by Burch's argument that this claim relates back to
5 initial ground seven, which was a claim that the state failed to preserve exculpatory
6 evidence. Among other unrelated matters, Burch alleged in initial ground seven:

7 Why didn't detective Heidt seek out two really good witnesses? Detective
8 Heidt should have sought out and questioned Cheyenne and David.
9 Detective Heidt did not bother with either of them because they would have
 painted a totally different picture from what detective Heidt's witchhunt for
 an alleged sexual assault.

10 (ECF No. 7 at 24.) Burch alleges that although the claims are different, the operative facts
11 are the same. (ECF No. 43 at 12-13 (citing *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1297
12 (9th Cir. 2013), *abrogated on other grounds by Davila v. Davis*, 137 S. Ct. 2058 (2017)).)
13 The claims share one fact: Cheyenne and David might have provided information that was
14 helpful to Burch. The similarities end there. The facts in initial ground seven involved a
15 detective during the police investigation of the case. The facts in amended ground six(C)
16 involves Burch's counsel during the preparation of the case. These facts are different in
17 time and type. In a similar situation, the Ninth Circuit has held, "The core facts underlying
18 the second theory are different in type from the core facts underlying the first theory," and
19 determined that such a claim does not relate back. *Schneider v. McDaniel*, 674 F.3d 1144,
20 1151 (9th Cir. 2012). Likewise, ground six(C) does not relate back, and it is untimely.

21 Respondents argue in the alternative that amended ground six(C) is untimely
22 because the ground upon which Burch relies for relation back, initial ground seven, itself
23 is unexhausted. They rely upon a peculiar statement in *Ha Van Nguyen*:

24 A claim added to a timely filed habeas petition after the expiration of the
25 statute of limitations is timely only if the new claim relates back to a properly
26 filed claim contained in the original petition. To be properly filed, a claim must
 have been exhausted at the time of filing. *King v. Ryan*, 564 F.3d 1133, 1142
 (9th Cir. 2009).

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1 736 F.3d at 1296.⁴ Burch counters that Respondents' argument is contrary to *Rhines v.*
2 *Weber*, 544 U.S. 269 (2005), which held that, upon a showing of good cause, a district
3 court may stay an mixed petition to allow a petitioner to exhaust all his grounds for relief
4 without worrying about the one-year period of limitation. The Court need not try to reconcile
5 *Ha Van Nguyen* with *Rhines*, because the Court has held that amended ground six(C)
6 does not relate back to initial ground seven, regardless of the exhaustion of initial ground
7 seven.

8 **6. Ground eight is timely**

9 Ground eight is a claim of ineffective assistance of appellate counsel. Burch argues
10 that counsel on direct appeal should have raised "(A) the claim discussed in Ground Two,
11 that Ms. Murga's testimony about Mr. King's DNA analysis violated Mr. Burch's
12 Confrontation Clause rights; (B) the claim discussed in ground five, that the admission of
13 P.R.'s improperly redacted statement violated Mr. Burch's federal right to due process;
14 and (C) the claim discussed in Ground Nine, that the police failed to preserve potentially
15 exculpatory evidence." (ECF No. 19 at 25-26.) Ground eight(A) shares the same operative
16 facts as ground two. Ground eight(B) shares the same operative facts as ground five.
17 Ground eight(C) shares the same operative facts as ground nine. Respondents do not
18 challenge the timeliness of grounds two and nine, so grounds eight(A) and 8(C) relate
19 back to the same facts in the initial petition that grounds two and nine relate back to.
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21 ⁴This is not the only peculiarity of *Ha Van Nguyen*. The Court takes judicial notice
22 of the docket of the Ninth Circuit, Case No. 11-56792, and the docket of the United States
23 District Court for the Central District of California, Case No. 8:08-cv-00198-JLS-FFM. The
24 Ninth Circuit denied rehearing en banc on April 25, 2014. After remand, on May 20, 2014,
25 the respondent Curry moved to stay the case pending a determination whether to petition
26 the Supreme Court for a writ of certiorari. The district court denied the motion on May 27,
27 2014. On June 3, 2014, Ha Van Nguyen's counsel filed a motion to dismiss the petition as
28 moot because Ha Van Nguyen had died. On June 10, 2014, the district court directed
Curry to show cause why the petition should not be dismissed as moot. On June 16, 2014,
Curry filed a response that did not oppose the request to dismiss the petition. On June 30,
2014, the district court dismissed the petition as moot because of the death of Ha Van
Nguyen. See *Griffey v. Lindsey*, 349 F.3d 1157 (9th Cir. 2003). Accord, *Farmer v.*
McDaniel, 692 F.3d 1052 (9th Cir. 2012). The time to petition for a writ of certiorari had
not yet expired before the district court dismissed the petition as moot. To the best of this
court's knowledge, nobody sent the Ninth Circuit the information that the petition had
become moot by the petitioner's death.

1 Respondents have challenged the timeliness of ground five, but the Court has found that
2 it relates back to grounds two and three of the initial petition. Ground eight(B) thus also
3 relates back to grounds two and three of the initial petition. *See Ha Van Nguyen*, 736 F.3d
4 1297.

5 Respondents argue that *Ha Van Nguyen* conflicts with the earlier *Schneider v.*
6 *McDaniel*, 674 F.3d 1144, 1151 (9th Cir. 2012), and that *Schneider* should control. (ECF
7 No. 50 at 10.) The Court disagrees. The Court has discussed the relevant part of
8 *Schneider* regarding the untimeliness of ground six(C). In both ground six(C) and that part
9 of *Schneider*, only one fact was common between the initial ground and the amended
10 ground. Otherwise, the actors were different, their actions were different, and the times of
11 the actions were different. As *Schneider* stated, “The core facts underlying the second
12 theory are different in type from the core facts underlying the first theory.” 674 F.3d at 1151
13 (emphasis added). In contrast, as noted above, the three issues in ground eight that Burch
14 claims appellate counsel should have raised share the same core facts with claims in the
15 initial petition. Consequently, *Ha Van Nguyen* is applicable, and *Schneider* is inapplicable
16 to ground eight.

17 **7. Ground 10 is timely**

18 Ground 10 is a claim of cumulative error, based upon the claims in grounds one,
19 two, and five. (ECF No. 19 at 27-28.) Respondents argue that ground 10 is not timely
20 because it relies upon ground five, which they argue is untimely. However, the Court has
21 found that ground five is timely. All the claims upon which ground 10 relies are timely, and
22 thus ground 10 is timely.

23 **B. EXHAUSTION**

24 Before a federal court may consider a petition for a writ of habeas corpus, the
25 petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To
26 exhaust a ground for relief, a petitioner must fairly present that ground to the state’s
27 highest court, describing the operative facts and legal theory, and give that court the

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1 opportunity to address and resolve the ground. See *Duncan v. Henry*, 513 U.S. 364, 365
2 (1995) (per curiam); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

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4 **1. Burch’s arguments for technical exhaustion, procedural
default, and the excuse of that procedural default**

5 In the Amended Petition, Burch acknowledges that he has not exhausted his state-
6 court remedies for grounds two, five, six(A), six(B), six(D),⁵ eight, nine, and 10. In response
7 to Respondents’ motion to dismiss, Burch argues that the Court should consider these
8 grounds technically exhausted. He argues that lacks an available remedy in state courts
9 because they would find his petition time-barred and successive. (ECF No. 43 at 15.)
10 Burch then states that the grounds would be procedurally defaulted in this Court. However,
11 Burch argues that he can show cause to excuse the procedural default due to the
12 ineffective assistance of post-conviction counsel, “based upon principles related to
13 *Martinez v. Ryan*, 566 U.S. 1 (2012).” *Id.* Burch then notes that Nevada does not accept
14 the argument for cause under *Martinez*. *Id.* (citing *Brown v. McDaniel*, 331 P.3d 867 (Nev.
15 2014)). Consequently, Burch argues, this court can excuse the procedural default of
16 grounds two, five, six, eight, nine, and 10, and review those grounds on the merits.

17 Other than *Martinez*, Nevada’s standards for cause and prejudice to excuse the
18 procedural bars of NRS §§ 34.726(1) and 34.810(2) are functionally identical to the federal
19 standards for cause and prejudice to excuse a procedural default. *Robinson v. Ignacio*,
20 360 F.3d 1044, 1052 n.3 (9th Cir. 2004).

21 **2. *Martinez* and its limits**

22 The general rule is that a habeas corpus petitioner has no right to, and thus no right
23 to the effective assistance of, post-conviction counsel. *Coleman v. Thompson*, 501 U.S.
24 722, 752 (1991) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). *Martinez* created an
25 equitable exception to that rule for procedurally defaulted claims of ineffective assistance
26 of trial counsel. *Martinez*, 566 U.S. at 14. That exception applies where either the state
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28 ⁵Respondents actually argue that all of ground six is not exhausted, but the Court
is dismissing ground six(C) because it is untimely.

1 court did not appoint counsel in the initial-review collateral proceeding for a claim of
2 ineffective assistance at trial, or where appointed counsel in the initial-review collateral
3 proceeding—at which the claim should have been raised—was ineffective under the
4 standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* To overcome the default,
5 a prisoner must demonstrate that the underlying ineffective-assistance-of-trial-counsel
6 claim is a substantial one—that the claim has some merit. *Id.* (citation omitted). *Martinez*
7 “does not concern attorney errors in other kinds of proceedings, including appeals from
8 initial-review collateral proceedings, second or successive collateral proceedings, and
9 petitions for discretionary review in a State’s appellate courts.” *Id.* at 16. *Coleman* still
10 applies in those situations. *Id.* *Martinez* does not apply to procedurally defaulted claims of
11 ineffective assistance of counsel on direct appeal. *Davila v. Davis*, 137 S. Ct. 2058 (2017).

12 **3. *Martinez* does not apply to all the procedurally defaulted**
13 **grounds**

14 Grounds six(A), six(B), and six(D) are claims of ineffective assistance of trial
15 counsel. *Martinez* can apply to these grounds. Ground eight contains claims of ineffective
16 assistance of appellate counsel. *Martinez* does not apply to ground eight. *See Davila*, 137
17 S. Ct. at 2063. Burch acknowledges *Davila*, disagrees with it, and is preserving the issue
18 for further review. (ECF No. 43 at 18.) Grounds two, five, and nine are not claims of
19 ineffective assistance of trial counsel. *Martinez* does not apply to them. Ground 10 is a
20 claim of cumulative error that refers to grounds one, two, five, and 9, all of which are not
21 claims of ineffective assistance of trial counsel. *Martinez* does not apply to ground 10.

22 Burch argues that if he can demonstrate cause and prejudice under *Martinez* to
23 excuse the procedural default of grounds six(A), six(B), and six(D), then those grounds
24 can be cause to excuse the other procedurally defaulted grounds. Burch’s legal theory is
25 sound, but it does not apply to all the procedurally defaulted grounds, as the Court will
26 explain below.

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1 **4 The Court will defer its procedural-default ruling on ground six**

2 With grounds six(A), six(B), and six(D), the Court prefers to address these matters
3 in the same manner that it often does when a claim of cause and prejudice is based upon
4 an independent claim of constitutionally ineffective assistance of either trial or appellate
5 counsel. In such circumstances, the Court often defers a resolution of the cause-and-
6 prejudice analysis until after the filing of an answer and reply contingently addressing the
7 claims also on the merits, so that the Court may have the benefit in its analysis of a full
8 factual and legal presentation as to all relevant claims. That is the procedure that the Court
9 will follow herein.

10 **5. If Burch can demonstrate cause to excuse the procedural default**
11 **of ground six(A), then ground six(A) can because to excuse the**
12 **procedural default of ground two**

13 In ground two, Burch alleges that Craig King performed DNA testing on evidence
14 and produced a report. Kimberly Murga signed the report as a reviewer. Burch further
15 alleges that King did not testify at trial; Murga did testify about the contents of the report.
16 This, Burch claims, violated the Confrontation Clause of the Sixth Amendment because
17 Burch had no opportunity to cross-examine King. *See Melendez-Diaz v. Massachusetts*,
18 557 U.S. 305 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004). Ground six(A) is a
19 claim that trial counsel provided ineffective assistance because trial counsel did not make
20 this Confrontation-Clause objection at trial.

21 When a constitutional claim is procedurally defaulted, and the petitioner tries to
22 demonstrate cause by claiming ineffective assistance of counsel, the claim of ineffective
23 assistance of counsel itself must not be procedurally defaulted. *Edwards v. Carpenter*, 529
24 U.S. 446, 453 (2000). However, if the petitioner can demonstrate cause and prejudice to
25 excuse the procedural default of the claim of ineffective assistance of counsel, then the
26 claim of ineffective assistance of counsel can be cause to excuse the procedural default
27 of the constitutional claim. *Id.*

28 Burch argues that if he can demonstrate cause to excuse the procedural default of
ground six(A), then the ineffective assistance of counsel alleged in ground six(A) can

1 excuse the procedural default of ground two. (ECF No. 43 at 28.) Respondents counter
2 that this would be an impermissible expansion of *Martinez* to bypass procedural bars of
3 other claims. (ECF No. 50 at 13 (quoting *Davila*, 137 S. Ct. at 2609).) However, *Davila*
4 held that *Martinez* did not extend to procedurally defaulted claims of ineffective assistance
5 of appellate counsel. *Davila* did not purport to overturn or limit *Carpenter*, which noted that
6 the excuse of a procedurally defaulted claim of ineffective assistance of counsel can then
7 excuse the procedural default of a constitutional claim. The Court sees no principled
8 reason why to give an excuse of a procedural default by *Martinez* any less effect than any
9 other excuse of a procedural default.

10 The Court will treat the procedural default of ground two the same way that it will
11 treat the procedural default of grounds six(A), six(B), and six(D). The Court will defer the
12 ruling on the procedural default until after the filing of an answer and reply that contingently
13 address the merits of ground two.

14 **6. Neither *Martinez*, by itself or in conjunction with *Carpenter*, can**
15 **excuse the procedural default of the other unexhausted grounds**

16 Ground five is a claim that the prosecution committed misconduct by playing an
17 incorrectly redacted recording of the police interview of P.R., which allowed the jury to
18 hear about some of Burch's prior uncharged misconduct. Ground nine is a claim that the
19 prosecution failed to preserve potentially exculpatory evidence. Ground 10 is a claim of
20 cumulative error that relies upon grounds one, two, and five.

21 The remaining claims of ineffective assistance of trial counsel have no connection
22 to grounds five, nine, and ten. Ground six(A) is a claim that trial counsel failed to raise the
23 Confrontation-Clause issue described in ground two. Ground six(B) is a claim that trial
24 counsel failed to object to the lack of statutorily-required notice about the prosecution's
25 intent to introduce the recording of P.R.'s interview by police. Ground six(D) is a claim that
26 trial counsel failed to adequately cross-examine the mother of P.R. Even if the Court could
27 excuse the procedural default of grounds six(A), six(B), and six(C), those grounds could
28 not excuse the procedural defaults of the unrelated grounds five, nine, and 10.

1 Ground eight(A) is a claim that appellate counsel failed to raise on direct appeal the
2 claim in ground two—that Burch’s Confrontation-Clause rights were violated when Murga
3 testified about the results of the DNA test that King had performed. Ground eight(B) is a
4 claim that appellate counsel failed to raise on direct appeal the claim in ground five,
5 regarding the admission of the incorrectly redacted recording of P.R. that let the jury hear
6 about some of Burch’s prior uncharged misconduct. Ground eight(C) is a claim that
7 appellate counsel failed to raise on direct appeal the claim in ground nine, that the
8 prosecution failed to preserve potentially exculpatory evidence. If Burch can demonstrate
9 cause and prejudice to excuse the procedural default of ground eight, then ground eight
10 could be cause to excuse the procedural default of grounds two, five, and nine. See
11 *Carpenter*, 529 U.S. at 453. However, Burch’s only argument for cause and prejudice is
12 the ineffective assistance of post-conviction counsel under *Martinez*, and *Martinez* does
13 not apply to procedurally defaulted claims of ineffective assistance of appellate counsel.
14 *Davila*, 137 S. Ct. at 2063. Consequently, ground eight cannot excuse the procedural
15 default of grounds two, five, and nine.⁶

16 **7. Burch will need to choose what to do with the unexhausted**
17 **grounds**

18 Burch asserts that the Nevada state courts will apply the procedural bars of NRS
19 §§ 34.726(1) and 34.810(2). The Court agrees. He further insists that the Nevada state
20 courts will not accept the argument for cause and prejudice that he presents here, namely,
21 *Martinez v. Ryan*. Again, the Court agrees. What Burch does not state is that *Martinez* is
22 his *only* argument for cause and prejudice. If it is, then the Court would dismiss grounds
23 five, eight, nine, and 10, because *Martinez*, either by itself or in conjunction with *Carpenter*,
24 could not excuse the procedural default. Instead, the Court will give Burch a choice. He
25 can dismiss the unexhausted grounds five, eight, nine, and 10. If he has other arguments
26 for cause and prejudice, then he can move to stay the action under *Rhines v. Weber*, 544
27

28 ⁶Independent of ground eight, ground six(A) might excuse the procedural default of
ground two.

1 U.S. 269 (2005). Otherwise, if there is some other relief that Burch wants, he can move
2 for that.

3 **IV. CONCLUSION**

4 It is therefore ordered that Respondents' motion to dismiss (ECF No. 34) is granted
5 in part and denied in part. Grounds three, four, and six(C) of the Amended Petition (ECF
6 No. 19) are dismissed as untimely.

7 It is further ordered that Petitioner shall have 30 days from the date of entry of this
8 order to file a motion for dismissal without prejudice of the entire Petition, for partial
9 dismissal of grounds five, eight, nine, and 10, or for other appropriate relief. Within 10 days
10 of filing such motion, Petitioner must file a signed declaration under penalty of perjury
11 pursuant to 28 U.S.C. § 1746 that he has conferred with his counsel in this matter
12 regarding his options, that he has read the motion, and that he has authorized that the
13 relief sought therein be requested. Failure to comply with this order will result in the
14 dismissal of this action.

15 It is further ordered that Petitioner's motion for reconsideration (ECF No. 44) is
16 denied.

17 DATED THIS 26th day of March 2020.

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19 
20 _____
21 MIRANDA M. DU
22 CHIEF UNITED STATES DISTRICT JUDGE
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